DUKE UNIVERSITY LIBRARY

Judicial Settlement

of International Disputes

No. 5

The Work of the Hague Court

By N. Politis

Professor of Law, University of Paris

NOVEMBER, 1911

Published Quarterly by American Society for Judicial Settlement of International Disputes.

Baltimore, U. S. A.

KZ
4850
.J835
no.6

Entered as secon[illegible]rch 21, 1910, at the Postoffice at [illegible]nder the Act of July 16, 1894.

LEX

The Work of the Hague Court

By N. Politis
Professor of Law, University of Paris
(Translated)

I

Three years ago M. Leon Bourgeois closed a most eloquent discourse by saying that the delegates of the Nations at the Second Hague Peace Conference had, in the course of its memorable sittings, "heard the first heart-beats of humanity, very faint as yet, but already quite regular and distinct."

That was an admirable metaphor with which to indicate that—compared with society as organized within the state—the society of nations is still, so to speak, in embryo. Its organization, scarcely outlined as yet, is developing bit by bit under our eyes. It already has certain laws; but these laws are most

incomplete, and the governments are seeking, with increasing regularity and growing activity, to fill numerous gaps. It likewise has a system of justice; but if it is no longer quite private justice neither is it as yet true public justice. It is an intermediary system, a sort of make-believe which all human societies have practised before possessing permanent tribunals; its name is arbitral justice.

This system of justice is of ancient origin. In 1899 the Nations sought to improve it by creating at The Hague an institution termed the Permanent Court of Arbitration. This was the great innovation made by the First Peace Conference. But we must not be deceived by terms. Like the old Holy Roman Empire, the Hague Court by no means merits its title; it has no permanence and does not present any of the essential characteristics of a true court of justice.

That which one really finds at The Hague is simply a place where justice may be dispensed when the Nations are minded to send any judges there. Its locus is a modest house at the edge of a quiet canal, with an audience

room so small that when counsel are numerous the arbitrators are compelled to seek the hospitality of the government of the Netherlands. Thanks to the generosity of Mr. Carnegie the Court of Arbitration will soon have an adequate locus in the form of a superb marble palace.

Although we do not find judges resident at The Hague, we find there the means for procuring them. There exists at the locus of the Court a long list on which the Nations have each placed at most the names of four men designated by them members of the Court. These men are chosen from among the most honorable and distinguished persons who are disposed to accept the duties of an arbitrator when a case for arbitration arises. The list is designed to facilitate the selection of arbitrators by the governments concerned, although their choice is not limited to it.

At first public opinion was very skeptical as to the future of this institution, so timid and poor did it appear. The authors of it alone manifested any confidence in it. They felt certain that, once installed, the Court would soon be burdened with cases.

Nevertheless after the Court was inaugurated it waited three years in vain for a case.

Its first case came to it from the New World. The United States and Mexico brought before it a money dispute of long standing. And its first decision was finally rendered October 14, 1902.

A beginning had been made. The example was soon followed. Close upon each other's heels, from 1902 to 1904, in connection with four cases of different nature, twelve Nations came to The Hague to choose their judges.

But this ardor did not last. In 1905 the Court rose not to sit again for four long years. Then in 1909 it renewed its activity and in twenty months it succeeded in doubling the number of decisions rendered. Seven States, all former pleaders in the first period of its activity—"old offenders"—came to ask the Court to solve for them five different questions.

II

Thus the Hague Court has to its credit achievements sufficiently important. In the course of ten years it has been active enough

for us to note its advantages and its defects. But the problem is not simple, and we run the risk of pronouncing a hasty judgment unless we are careful to examine all sides of it. Remarking only the number of cases brought before the Court, the nature of them, and the value of the decisions, we are tempted to declare that the services rendered by the Hague Court are rather mediocre. One notes that the great majority of arbitrations do not, as yet, really come to The Hague. During these ten years of its existence and despite its exceptional activity in the last few months, the Court has attracted to itself hardly one-sixth of the arbitrations which have taken place.

We must of course remember the difficulties inherent in starting every new institution. We cannot change, in a day, habits practised for generations. As the Hague Court becomes better known and as its work inspires more confidence, it will be more resorted to. There is already discoverable a movement which augurs well for the future: the activities of the Court, renewed in 1909 and pursued through 1910 and 1911, are about to be continued by the cases which Russia and Turkey, Italy and

Peru have already resolved to submit to it, and by other arbitrations which are actually projected.

But even from the standpoint of their importance, the cases brought before the Hague Court do merit attention. True, the reference of some of them to arbitration was not based upon a crying necessity. The question between the United States and Mexico of the Pious Funds of the Californias was taken out of its pigeon-hole simply to enable the Hague Court to start. Similarly the Boutres of Muscat became a subject of arbitration owing merely to the desire of the States concerned to give practical application to their treaty of arbitration of 1903. Finally the recent Savarkar affair was submitted to the Hague Court for the purpose less of terminating a deadlock between two governments than of satisfying the susceptibilities of certain journals.

In other cases which have come before it the Hague Court has, however, rendered real service. By means of the Court it was possible to arrive at a peaceful and honorable settlement of controversies, the solution of which

could not have been attained by direct negotiation.

True, the solution offered by the Court has not always been what it should have been. In order to estimate properly the value of its awards we must keep in mind the two principal functions of arbitration. Arbitration is, or rather aims to be, a judicial process by which States may have the law defined in disputes of a justiciable nature, though it still preserves its historic office as a diplomatic process, permitting States, in the event of political conflicts where their dignity appears to prevent voluntary compromise, to accept a compromise which an arbitrator imposes upon them in the name of the superior principle of justice. In such a case, it is true, the cause of peace gains more than the cause of law; but law would lose still more if peace were not preserved. And then, homage to justice is never sterile. While awaiting the coming of its proper sway, justice is offering an ever broader shelter to diplomatic concessions.

According as arbitration fulfills one or the other of its functions, the role of the arbitrator differs and the significance of the award varies.

The value of arbitration as an instrument of law depends above all on the award because it determines legality. The arbitrator ought to be made to feel that peace does not depend upon his decision. He may, and legally he should, say without ulterior motive "let justice be done;" he should fix his attention less on the adjustment of difficulties than on the practical application of the law.

As an instrument of peace, on the other hand, arbitration has value by virtue of its very spirit, i. e. because of the pacific intention of the States that employ it. In serious controversies, involving national pride, arbitration has a calming effect. That effect results from compromise. The moment an agreement to resort to arbitration is reached, discussions become useless and recriminations lose their object. Moreover, the award is then only of secondary interest. So much so that what one expects from it is simply to confirm the desire for peace which is already manifested by the "compromis" or conditions of the arbitration. The arbitrator should concern himself with justifying the confidence reposed in him by the parties to the controversy, with rounding

the angles and with couching his award in prudent language which will not offend the susceptibilities of either party.

Each of these offices of arbitration has its own domain, that of justice being limited to controversies of a juridical character, that of peace to controversies of a political character. This distinction is important because, if it leaves its proper domain, each runs the risk of failing in the effect which one has a right to expect of it. To employ pacific arbitration in legal controversies is to interpret falsely the conception of justice. To resort to judicial arbitration in political controversies is to endanger the maintenance of peace.

This distinction recommends itself to our judgment because of still another consideration: namely, the more the distinction is observed the better will we succeed in encouraging resort to arbitration in political conflicts. It is commonly remarked that arbitration is not susceptible of indefinite extension, that it has its necessary limitations, that political questions are outside of its domain because arbitration, being by definition the adjustment of controversies "on the basis of respect for

law" (Convention of 1907 for the Pacific Regulation of International Controversies, art. 37), it cannot be applied to disputes for the solution of which law fails to supply any rules, and that the progress of arbitration must therefore be subordinated to that of law. This thesis is perhaps contestable in theory because there are practically no political questions which may not be translated into questions of law. It is none the less true that as a doctrine it carries weight and in actual practice influences the nature of treaties in which we find obligatory arbitration ordinarily confined to very narrow limits. If this be so, it is because in speaking of arbitration one thinks above all about its judicial function. But if we examine its pacific function in which the rigidity of law is less governing and the role of arbitrator becomes more flexible, the aspect of the question is changed and arbitration appears susceptible of an indefinite extension. Therefore to distinguish between its two functions tends to promote its growth. The conclusion of treaties of obligatory arbitration without reservations is rendered easier because the difficulties which may arise in carrying out such agreements are

caused to disappear in advance. Of course there remains the necessity of separating political questions from juridical questions, and this is not an easy task. Men have occasionally asserted that it was an impossible task, and consequently that obligatory arbitration, if limited to juridical questions, was impractical, because, in default of the ability to define what constitutes a juridical question, it is always possible to escape the obligation to resort to arbitration by setting up as an excuse the political character of the controversy. This objection falls if it be understood that the nature of the controversy shall affect only the form of the arbitration without at any time wholly excluding the arbitration. As to the problem of determining the nature of the controversy, it would seem that it is a question of attitude of mind rather than a question of kind. In short, that which signifies is less the intrinsic character of the dispute than the complexion the dispute takes on by reason of the States which are parties to it, and of the whole circumstances which have brought it up. A controversy plainly juridical may degenerate into a political controversy the moment na-

tional honor becomes involved. The desertions at Casablanca constitute a striking case in point. Reciprocally, a question of influence and domination may be made to turn upon a question of law which will be found included in it if peaceful intentions on the part of the States concerned incline them to deprive the dispute of its political character. This is what happened in the Boutres of Muscat case.

III

But in order that arbitration be effectively employed, according to circumstances, in its several ways, it is not sufficient simply to distinguish the offices it performs, nor to define merely its domain and its logical effects. We must go further and separate them in a somewhat material fashion, giving to each its distinct organ. Just here appears the insufficiency of the Hague Court.

In its practical operation the Hague Court has discovered itself to be rather an adjunct to the chancelleries than a true international tribunal. It has been more inclined to the pacific function than to the judicial function. Naturally this is the case in connection with matters,

the political side of which is the dominant side, as in the Casablanca arbitration already referred to where the award was a masterpiece of juridical adaptation and diplomatic conciliation. But the Court has occasionally acted in the same manner in cases where peace was not threatened and where accordingly the questions of law submitted to the Court should have been approached by it with all the rigor of juridical reasoning. On this score many of its decisions deserve only qualified approval, or are even open to criticism. This is true of the award giving preference to certain creditors of Venezuela (February 22, 1904), of the Boutres of Muscat case (August 8, 1905), of the Atlantic Fisheries case, the more especially in connection with the definition of bays (September 5, 1910), and of the Savarkar affair (February 24, 1911).

Such result is due primarily to the way in which the Court is organized. The arbitrators called to sit in each case are the objects of a choice which binds them to the contestants from whom they receive their mandate. Inasmuch as they may be diplomats and are sometimes nationals of the countries parties to the dispute, they do not bring to the deliberations

of the Court—and have never been suspected of so doing—the spirit of impartiality and the disposition of the true judge. Being temporary, without connection with those which have preceded and which are to follow them, the tribunals called into brief existence at The Hague cannot contribute to the upbuilding of a systematic jurisprudence.

To remedy this defect, it becomes necessary to proceed to establish the truly permanent Court recommended by the United States. Thanks to the foresight and praiseworthy activity of American diplomacy we are actually in a fair way to realize this project. And this development is in the natural order of things: in all human society the establishment of a permanent tribunal of public justice has resulted from the growth of arbitral justice. It responds today to a real need. The existing Court is specializing more and more in the pacific offices of arbitration, of which it tends to become the true organ in political conflicts. The judicial side of arbitration, on the other hand, awaits its instrument in the field of juridical controversies. When the time is ripe there will appear a truly permanent Court to fill this void.

We may feel certain that its creation will produce considerable changes in international relations, both juridical and political. Among these probable changes there is one which deserves to be pointed out now for the reason that it will fit in with a tendency which in our day is manifesting itself with growing intensity. In various ways one has been impressed lately with the necessity of promoting arbitration in disputes between States and individuals, in freeing it from preliminary diplomatic formalities which at present impede resort to it. We must do for arbitral justice that which has already been done for the law of prize: give to individuals direct recourse to an international tribunal, just as the Convention of 1907 (art. 4, sec. 2 and 3) provides shall be done in connection with the International Court of Prize. This step is not possible in connection with the Hague Court as at present organized, its diplomatic character offering a manifest obstacle. It will, on the contrary, be fully realizable in connection with a court truly permanent which, by its organization and by its judicial spirit, may be expected to meet all the requirements of international justice.

American Society for Judicial Settlement of International Disputes

The printed proceedings of the Conference of the American Society for Judicial Settlement of International Disputes, Washington, December 15-17, 1910, which furnished the occasion for the memorable utterance of President William Howard Taft on the subject of an all-inclusive treaty of arbitration, are now ready.

The collection of addresses will be found of great importance. They throw light on present day problems of an international character, containing most interesting historical reviews of certain aspects of internationalism and a profound study of law and courts which will give the book permanent value.

The discussion centered largely upon the proposed international court of justice, an idea which has been the hope of leading thinkers of the world for many generations and which

it is confidently believed we are on the eve of realizing.

The discussions were participated in by such statesmen, educators and men of affairs as:

President Taft
Hon. Simeon E. Baldwin
Hon. Richard Bartholdt
Justice Henry B. Brown
Andrew Carnegie
Hon. Joseph H. Choate
Hon. Wm. Bourke Cockran
Chas. W. Eliot
Hon. John W. Foster
Hon. Wm. Dudley Foulke
The French Ambassador
James Cardinal Gibbons
Edwin Ginn
Major-General Frederick D. Grant, U. S. A.
Chas. Noble Gregory
Francis W. Hirst
David Starr Jordan
Frederick N. Judson
Harry Pratt Judson
Hon. Martin W. Littleton
Hon. Francis B. Loomis
Hon. Henry B. F. Macfarland
Frederic D. McKenney
The Mexican Ambassador
Hon. Andrew J. Montague
The Minister of the Netherlands
Thomas Nelson Page
Jackson H. Ralston
Justice William Renwick Riddell
Hon. Elihu Root
James Brown Scott
Alpheus H. Snow
Rear-Admiral Chas. H. Stockton
Hon. Oscar S. Straus
Eugene Wambaugh
Benjamin Ide Wheeler
General Stewart L. Woodford

They suggest in a comprehensive way the immeasurable direct advantages which would accrue from the establishment of a court, together with certain collateral results such as the upbuilding of international law. Such growth of law would follow as a result of the decisions of the court and as a result further

of the codification of certain spheres of international law which would be invited by the very existence of such a court.

The volume will be found useful as a book of reference for those who have occasion to treat this subject in an essay or address at any time. It will be found particularly valuable for students of international questions.

Price, bound in paper, $1.00.

WILLIAMS & WILKINS COMPANY,
2427 York Road, Baltimore, Md.

American Society for Judicial Settlement of International Disputes

Officers

HONORARY PRESIDENT, WILLIAM HOWARD TAFT.

PRESIDENT, JOHN HAYS HAMMOND,
WASHINGTON, D. C.

VICE-PRESIDENT, SIMEON E. BALDWIN,
HARTFORD, CONN.

SECRETARY, THEODORE MARBURG,
BALTIMORE, MD.

TREASURER, J. G. SCHMIDLAPP,
CINCINNATI, OHIO.

Life membership, $100; Sustaining membership, $10 a year; Annual membership, $1 a year.

Remit to treasurer, J. G. Schmidlapp, Cincinnati, U.S.A. Address inquiries to secretary, Theodore Marburg, Baltimore, U. S. A.

The proceedings of the "Judicial Settlement" Conference at Washington, December 15-17, 1910, will be printed in English, French, German and Spanish. Each member of the Society will be entitled to one copy. Non-members may procure them for One Dollar a copy.

Additional copies of this or other issues of the Judicial Settlement Quarterly may be obtained without charge from the Assistant Secretary,

TUNSTALL SMITH,
THE PRESTON, Baltimore, U. S. A.

American Society for Judicial Settlement of International Disputes

Advisory Council

Lyman Abbott, New York.
Edwin A. Alderman, Virginia.
James B. Angell, Michigan.
Simeon E. Baldwin, Connecticut.
Richard Bartholdt, Missouri.
Alexander Graham Bell, Washington, D. C.
R. L. Borden, Ottawa, Ont.
Theodore E. Burton, Ohio.
Joaquin D. Casasus, Mexico City, Mexico.
George E. Chamberlain, Oregon.
Winston Churchill, New Hampshire.
George B. Cutten, Wolfville, N. S.
William R. Day, Ohio.
Jacob M. Dickinson, Washington, D. C.
Andrew S. Draper, New York.
Charles W. Eliot, Massachusetts.
Charles E. Fenner, Louisiana.
William Dudley Foulke, Indiana.
James Cardinal Gibbons, Maryland.
George Gray, Delaware.
Charles Noble Gregory, Iowa.
Peter S. Grosscup, Illinois.
Joseph F. Johnston, Alabama.
David Starr Jordan, California.
Harry Pratt Judson, Illinois.
William H. King, Utah.
George W. Kirchwey, New York.
Philander C. Knox, Washington, D. C.
Charles F. Libby, Maine.
Francis B. Loomis, Washington, D. C.
Horace H. Lurton, Tennessee.
R. McBride, Victoria, B. C.
Pablo Macedo, Mexico City, Mexico.
Charles Marcil, Ottawa, Ont.

Publications of the American Society for Judicial Settlement of International Disputes—

1. The New Era of International Courts, by Simeon E. Baldwin. August, 1910.

2. The Necessity of a Permanent Tribunal, by Ernest Nys. November, 1910.

Supplement—The American Society for Judicial Settlement of International Disputes, by James Brown Scott. November, 1910.

3. The Importance of Judicial Settlement, by Elihu Root. February, 1911.

4. The Development of the American Doctrine of Jurisdiction of Courts Over States, by Alpheus H. Snow. May, 1911.

5. An International Court of Justice the Next Step, by George Grafton Wilson.

Salient Thoughts, by Theodore Marburg. August, 1911.

6. The work of the Hague Court, by N. Politis. November, 1911.

ANNOUNCEMENT.

It is planned to hold this year's Judicial Settlement Conference at Cinncinnati November Seventh and Eighth. President William Howard Taft and representative men [illegible] various parts of the country have consented to be ent and to make addresses. Members of the society others interested in the cause are cordially invited to nd.

341.1
J92
#6

Sidney E. Mezes, Texas.
S. C. Mitchell, South Carolina.
Don Romulo S. Naón, Argentine Republic.
Francis G. Newlands, Nevada.
L. Oppenheim, Cambridge, England.
Thomas Nelson Page, Washington, D. C.
Walter H. Page, New York.
W. Peterson, Montreal.
Sir Thomas Raleigh, London, England.
Whitelaw Reid, London, England.
William Renwick Riddell, Toronto, Ont.
Uriah M. Rose, Arkansas.
A. C. Rutherford, Edmonton, Alberta.
Walter Scott, Regina, Saskatchewan.
Albert Shaw, New York.
Hoke Smith, Georgia.
Bishop Robert Strange, North Carolina.
Sir Charles Hibbert Tupper, Vancouver, B. C.
George Turner, Washington.
Charles R. Van Hise, Wisconsin.
Benjamin Ide Wheeler, California.
William Allen White, Kansas.
George G. Wilson, Rhode Island.
Prince de Cassano, Italy.

Publications of the American Society for Judicial Settlement of International Disputes—

1. The New Era of International Courts, by Simeon E. Baldwin. August, 1910.

2. The Necessity of a Permanent Tribunal, by Ernest Nys. November, 1910.

Supplement—The American Society for Judicial Settlement of International Disputes, by James Brown Scott. November, 1910.

3. The Importance of Judicial Settlement, by Elihu Root. February, 1911.

4. The Development of the American Doctrine of Jurisdiction of Courts Over States, by Alpheus H. Snow. May, 1911.

5. An International Court of Justice the Next Step, by George Grafton Wilson.

Salient Thoughts, by Theodore Marburg. August, 1911.

Duke University Libraries
D04363280Q